22082

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRYAN ALAPERET and LAURIE ALAPERET,
by KAREN ALAPERET, as Guardian ad Litem,
and KAREN ALAPERET,
Plaintiffs-Appellants,

vs.

[redacted]

W. D. PHELPS, d/b/a PHELPS PUMP
AND EQUIPMENT COMPANY,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA

BRIEF FOR PLAINTIFFS-APPELLANTS

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JURISDICTIONAL STATEMENT

This is an appeal by the plaintiffs from a summary judgment in defendant's favor entered in the Federal District Court for the State of Nevada on May 12, 1967. Notice of appeal was entered and filed, with Appellant's Cost Bond, on June 9, 1967 in that court.

Jurisdiction in the District Court to hear this action for the wrongful death of plaintiffs' decedent is properly predicated on 28 U.S.C. § 1332(a), the plaintiffs being citizens and residents of the State of Michigan and the defendant being a citizen and resident of the State of Nevada at the time this action commenced. The amount in controversy is $500,000.00.

Jurisdiction in this Court of Appeals to review the summary judgment entered in the Federal District Court for the State of Nevada is properly predicated upon 28 U.S.C. §§ 1291, 1294.

STATEMENT OF THE CASE

This is a diversity action for wrongful death with its substantive basis lying in the Nevada Industrial Insurance Act, N.R.S. 616.560. It is a "third party" action.

In their complaint, plaintiffs allege that the defendant, through his employees, negligently introduced oxygen into a well casing in which plaintiffs' decedent was welding, causing his death four months later from the burns suffered when the oxygen exploded. The plaintiffs are the wife and the two minor children of the deceased, Douglas Alaparet. The defendant, a well-drilling contractor, denies any negligence in this occurrance. The questions of liability and damages are not now before this court.

After issue had been joined, the defendant moved for summary judgment urging much the same grounds as in his second motion for summary judgment. The trial court denied the first motion believing a jury question to be involved (14a). The defendant then made a second motion for summary judgment which was granted. The theory upon which this second motion was granted was that by vir-

tue of N.R.S. 616.085 subcontractors' employees are barred from instituting "third party" actions against their principal contractor, that under N.R.S. 616.115 subcontractors are deemed to include independent contractors; and therefore, whether Harlan McNair was a subcontractor or an independent contractor, his employee, Douglas Alaparet, would be barred from recovery against the defendant in a "third party" action (13a-14a). Simply stated, Douglas Alaparet was adjudged to have been a "statutory employee" of the defendant.

The sole question raised by this appeal is whether or not Douglas Alaparet was a "statutory employee" of the defendant at the time his fatal injury was incurred through the alleged negligence of the defendant's employees. If so, the summary judgment was properly given. If not, then this action should proceed to the merits. It is plaintiffs' position that application of the *correct* legal principles to the undisputed facts surrounding Douglas Alaparet's employment establishes that Douglas Alaparet was not an employee of the defendant.

At some time prior to Alaparet's fatal injury, the defendant had entered into a contract with the Las Vegas Water District whereby defendant was to drill a well upon property over which the Water District had an easement (15a, 20a-21a, 22a-24a). The well was to be constructed of 20″ I.D. casing sunk to a depth of 100′ (23a). The method of sinking this casing appears to have been as follows: A section of the casing was partially lowered into the ground, then another section was placed on top of this section. The two sections were then welded together by means of a continuous, electric weld around the outside of the joint where the two sections met. The newly welded sections were then lowered into the ground until the top of the second section was just above the ground. A third section was then placed on top of the second section and the same welding and lowering operation was repeated. The entire welding operation took place two to four feet *above* the ground. At no time was it necessary to go underground to weld or to weld on the inside of the casings in order to connect the sections of casing together. The duties of the

defendant's only welder were solely confined to this surface operation and other miscellaneous surface repairs on the drilling rig (3a-5a, 9a).

On November 29, 1964, one of the defendant's employees noticed an improper movement of the casings as they were being lowered into the ground. By means of a mirror, he was able to discern a break and fracture in the well casing (20a). The decision as to how the fracture was to be repaired was left to the defendant's field supervisor who determined that the fracture would have to be repaired by a *specialist* (10a). The key reason for bringing in a specialist was that the welding needed to repair the fracture was completely different from the welding used to initially connect the sections of casing together and *that this type of welding was beyond the ability and scope of employment of the defendant's one welder who was directly employed by him* (5a-6a, 10a, 11a, 12a, 16a (Q21), 21a).

All of defendant's employees indicated that they had never before observed or heard of a fracture in a well casing (1a, 10a, 12a). It might also be noted that the one welder employed by the defendant had had no experience in specialized welding, had previously worked for a small welding shop doing general welding (repair of boat trailers) in contrast to Alaparet who worked for a shop doing specialized repairs, had no experience in welding separated materials of the type which had to be connected in order to repair the fracture, or of welding casing fractures, nor had he any experience in welding inside a casing or inside similar structures, such as large culverts (5a-7a). The defendant's supervisor, therefore, had good reason to direct his driller "to locate a specialist, someone who could weld this fracture", which was inside the casing and 24 feet underground (11a).

The driller then contacted Harlan McNair, the owner of the General Machine Shop, with whom the defendant had never done business before (9a). Mr. McNair said his shop could do the work if the repair project was acceptable to Douglas Alaparet, his employee. The defendant's employees showed Mr. McNair and Alaparet a sketch

of the problem and they accepted the job (7a-9a). Neither the defendant nor his employees set out any method by which the repair was to be done (8a), nor were any plans or specifications given McNair or Alaparet (16a). According to the defendant, McNair and Alaparet were in full charge of the repair project, the decedent or McNair supplied all the special welding equipment needed, and the defendant's employees' only connection with the repair, other than the disputed question of who regulated the oxygen, was to lower Alaparet into the casing on a sling which the decedent had supplied himself (15a-17a).

Following the fatal injury to Alaparet, McNair billed the defendant $20.00 for the repair job, which was apparently the contract price for the job and which defendant paid (17a). After the injury to Alaparet, the defendant had to commence drilling an entirely new well, apparently because the fracture could not be repaired (17a-18a, 21a-22a).

SPECIFICATION OF ERROR UPON WHICH APPELLANTS RELY

The trial court erred in granting a summary judgment in favor of the defendant on the ground that plaintiffs' decedent was a statutory employee of the defendant: said ground being erroneous in that decedent's common law employer, Harlan McNair, was not a subcontractor to the defendant or, in the alternative, even if Harlan McNair, decedent's common law employer, were a subcontractor to the defendant, the decedent's statutory employment was both "casual" and not in the course of the defendant's trade, business, profession or occupation; excluding decedent, in either case, from the class of defendant's employees under the applicable Nevada statutes.

SUMMARY OF THE ARGUMENT

Nevada forecloses "third party" actions against employers and persons in the "same employ". Douglas Alaparet was clearly the common law employee of Harlan

McNair. He was just as clearly not the common law employee of the defendant. Solely on the basis of common law employment, this action could not be brought against Harlan McNair, but could be brought against the defendant.

However, Nevada has a "contractor-under" statute which creates a "statutory" employment between employees of a subcontractor and the principal contractor of the project upon which they work. Hence, with one important exception, employees of a subcontractor may not bring a "third party" action against their principal regardless of his negligence toward them.

Under Nevada law, the term "employee" excludes "any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer." While this exclusionary provision has not been construed by the courts of Nevada, similar provisions have been consistently construed to exclude persons who would be statutory employees, but for the operation of the "employee excludes" provisions. Persons, so excluded, may bring "third party" actions.

Assuming that the defendant was the principal contractor and Harlan McNair was a subcontractor on the repair project, the fact that Douglas Alaparet's employment was both "casual" and "not in the course of" would exclude him from being defendant's employee and permit his survivors to bring the present action.

The "casual" nature of Alaparet's employment is clearly evidenced by the fact that the total contract price was for only $20.00. Under Nevada law, employment is "casual" when the total *labor* cost is less than $100.00 and the total working time less than 10 days. Its "casual" nature is also fortified by evidence that the work was not a regular facet of defendant's operation and, in fact, had never before been needed in defendant's business of well drilling, nor apparently in the businesses of other well drillers similarly situated. In addition, the defendant had never before contracted with Harlan McNair for any sort of work and admitted that the repair of the fracture in the well casing was beyond the ability and scope of employment of his own employees.

The test as to whether work comes within the course of the business of the alleged employer hinges on whether the work is ordinarily done through employees of the alleged employer or of employers in a similar business. Defendant's business was drilling wells, not repairing fractures in well casings. On the contrary, the latter was closely connected with Harlan McNair's business of specialized welding. Defendant admitted that the repair work was outside of the scope of employment of the one welder he employed. This admission is substantiated by the experience and qualifications of the defendant's welder and the fact that the fracture was unprecedented. Defendant further admitted that specialized welding equipment, supplied by Harlan McNair, was needed for the repair. Specialized repairs, of the sort which the employer is not equipped to handle through his own force, have consistently been held to be outside the course of the employer's business. Moreover, it makes no difference whether the specialized repair is useful, necessary, or even absolutely indispensable to the employer's business, so long as the employer's regular employees do not ordinarily do such work.

Therefore, even if the defendant is considered to be a principal contractor by virtue of his contract to drill the well, Douglas Alaparet could not be considered his employee because of the exclusionary provision in the Nevada Industrial Insurance Act argued above.

If defendant was engaged in the business of repairing well fractures and was a principal contractor in relation to that particular business, an employee of a subcontractor could not recover from him in a "third party" action, Nevada apparently allows a person to engage temporarily in a business which is different from that person's primary business and be principal contractor in that business. It could be argued that defendant was temporarily engaged in the business of specialized welding, in addition to his permanent business of well drilling. Under Nevada law, the question then becomes whether the defendant was also a principal contractor in the temporary business or whether he was merely a person "having the work done". If the defendant is regarded as having tempo-

rarily assumed the business of specialized welding, he is clearly just a person "having the work done" since he had no previous experience with this type of specialized welding, took none or an inconsequential part in the work through employees directly hired by him, and did not let out other contracts for different phases of the specific project of repairing the fracture. A person "having the work done" is liable in a "third party" action since he cannot be a principal contractor and "statutory employer" to employees of subcontractors and independent contractors who are doing the work.

The defendant is caught on the horns of a dilemma. If he contends that, at the time of Alaparet's injury, he was engaged in the business of well drilling, there is no question that he was the principal contractor on the project to drill the well. However, even if McNair is assumed to be a subcontractor on that project, Alaparet could not be defendant's employee since his employment was both "casual" and not in the course of defendant's business of well drilling. If, on the other hand, defendant contends that the repair project was a business in which he was temporarily engaged, he escapes the above argument, but loses his principal contractor status in regard to that repair when it is looked at as being independent of the overall project of well drilling.

Although plaintiffs to this point have accepted defendant's argument that being an independent contractor makes one a subcontractor under Nevada law, as that equation does not affect the above arguments, it is rather doubtful that this follows the law of Nevada. Dicta in some cases aside, there is clear Nevada authority for the proposition that "independent contractors" are "subcontractors" only "when acting as subcontractors". Under the usual definition of subcontractor, this term not being defined in Nevada, Harlan McNair could not have been a subcontractor. Hence, Alaparet could not have been a statutory employee of the defendant.

Defendant will also argue that Nevada is a "common employment" state although this too has no bearing on the above arguments. As an aside, it should be noted that this argument is belied by the clear language of the Nevada

Act which establishes Nevada to be a "same employ" state, which is quite a different thing. However, even if Nevada were a "common employment" state, it would be necessary for the defendant to have shown that McNair entered into a contract to do part of the defendant's work and that the work done by McNair was not "merely ancillary and incidental" to the defendant's business in order for Alaparet to be considered defendant's employee. Neither of these conditions has been met and, in fact, the evidence shows the contrary.

A Court of Appeals may enter summary judgment for the appellant even though he did not move therefor. Plaintiffs suggest that the trial court took an incorrect view of the applicable law ruling the question of whether or not Douglas Alaparet was an employee of the defendant. Under a correct view of the law, the undisputed facts surrounding Alaparet's employment show that he could not have been an employee of the defendant, statutory or otherwise, at the time the fatal injury occurred.

Plaintiffs respectfully request this court to reverse the summary judgment with directions to enter judgment for the plaintiff's on the question of their decedent's employment status with the defendant and to proceed to the merits of their action.

ARGUMENT

Nevada Is A "Same Employ" State With A "Contractor-Under" Statute

It is well established that an employee may not sue his employer in a common law action for injuries negligently inflicted by the employer if the employer is insured under a workmen's compensation act. It is equally well established that an employee may sue a stranger in a common law action for injuries negligently inflicted by him. In the first case, the employee is left exclusively to his remedies under the compensation act. In the second case, he may accept compensation benefits and then sue the wrong-doing stranger at common law with subrogation rights given the compensation carrier for the bene-

fits already paid. The latter situation, a "third party" action, is guaranteed by statute or by the common law in all states. See *Larson, Workman's Compensation* § 71 (1961).

The present diversity action is a "third party" action whose substantive base is N.R.S. 616.560, which provides in pertinent part:

> "When an employee coming under the provisions of this chapter receives an injury for which compensation is payable under this chapter and which injury was caused under circumstances creating a legal liability in some person, *other than the employer or a person in the same employ,* to pay damages in respect thereof:
>
> "(a cause of action is established in the employee, or his survivors, against the third party wrongdoer with subrogation rights in the Nevada Industrial Commission for any compensation already paid to that employee or to his survivors)".

"Third party" statutes fall into four classes depending upon which persons are excluded from the classification of "third parties". Professor Larson sets out the variants as follows:

(1) the employer alone;

(2) *the employer and persons in the same employ;*

(3) the employer, persons in the same employ, and all contractors and their employees engaged upon a "common employment" or upon a "related purpose";

(4) all persons subject to the state's compensation system.

Larson, op. cit. supra, at § 72.00. The majority of states grant immunity only to the employer, but a sizable number also give immunity to persons in the same employ. *Id.* at §§ 72.10, 72.20.

A typical statute in this latter catagory is that of New York, Workman Compensation Act. Section 29(6),

> "The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee, or in the case of his death his decedents, when such employee is injured or killed by the negligence or wrong of *another in the same employ.*"

Even more in point with the above Nevada statute is that of Michigan, M.S.A. 17.189, which reads in pertinent part:

> "Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person *in the same employ* or the employer to pay damages in respect thereof (the employee may enforce this liability, etc.)"

Comparison of these statutes with the Nevada "third party" statute, N.R.S. 616.560, certainly supports the conclusion that Nevada is a "same employ" state. The thrust of this is that "third party" actions are more favored under Nevada Statute than in the states which have broadened the sweep of their compensation coverage beyond the "same employ" concept.

Only a few states have done so. Professor Larson lists the "common employment" states as Massachusetts, Minnesota, Oregon and probably Florida. *Larson, op. cit. supra,* at § 72.30. He lists the "complete immunity" states as Alabama, Illinois, and Washington. *Id.* at § 72.40. It might be noted that those states which go beyond the "same employ" concept have done so only after express judicial or legislative pronouncements to that effect. No state has stretched a "same employ" statute into a "common employment" or "complete immunity" rule. *Ibid.*

The effect of the Nevada "same employ" doctrine may be illustrated by the facts of the present case. These facts indicate that Douglas Alaparet was not a common law employee of the defendant. For example, there was no control over his activities as he was working on the casing repair

(8a, 15a-17a). Defendant admitted this fact and stated that McNair and Alaparet were in complete charge of the repair at the well site (15a-16a).

In *Nevada Industrial Commission v. Bibb*, 78 Nev. 377, 374 P.2d 531 (1962), the court said,

> "In determining whether an individual is an employee entitled to compensation under workmen's compensation acts, one test is that of control. If he is subject to the control, supervision, or authority of the person for whom work is done, his status is that of an employee within the meaning of such statutes."

The court, after touching on the "statutory employee" problem which will be considered later, went on to lay out several factors governing common law employment,

> ". . . (the employer), among other things, controlled Bibb's hours of work, his place of work, the nature of his work, the amount of work to be done, the right to discharge without liability, the furnishing of supplies, . . . and the compensation Bibb was to receive."

The record clearly shows that the above indicia of common law employment were completely absent between Douglas Alaparet and the defendant. Hence, if all Nevada looked at was the presence or absence of common law employment to determine whether a "third party" action could be brought, the defendant could certainly be liable in this "third party" action.

However, Nevada, like most other states, has broadened the concept of common law employment in cases where a principal-subcontractor relationship exists. The effect of this "statutory employment" is to make employees of the subcontractor employees of the principal contractor at the same time. This bars "third party" actions against the principal contractor even in those states which extend "third party" immunity to the employer alone. Plaintiffs take the position that there are no more indicia of "statutory employment" between Douglas Alaparet and the

defendant than there are indicia of common law employment.

Forty-two states, including Nevada, have "statutory employer" or "contractor-under" statutes. See *Larson, op. cit. supra,* at §§ 49, 72.31 (1961). Generally, these states hold a general contractor liable for compensation to the employee of an uninsured subcontractor under him, who is doing work *which is part of the business, trade, or occupation of the principal contractor. Ibid.* The latter point is very important to this case as it frequently permits "third party" actions to proceed where there would otherwise be "statutory employment", but for the requirement that the work be part of the principal's business. In any event, the basic theory of the "contractor-under" statutes is to protect an employee of an uninsured subcontractor and make it impossible for an unscrupulous principal contractor to escape liability for compensation by "farming out" work ordinarily done by the principal to irresponsible subcontractors. *Ibid;* see also *Simon Service v. Mitchell,* 73 Nev. 9, 15-16, 307 P.2d 110 (1957). Interestingly enough, the purpose of the "statutory employment" statutes is not necessarily to curb "third party" actions, but their use often does so; statutory employer-employee being linked to common law employer-employee.

Nevada's "contractor-under" statute actually encompasses several provisions of the Nevada Industrial Insurance Act. The "contractor-under" statute begins with the general provision that employers shall provide compensation for injuries sustained by an employee arising out of and in the course of his employment, said compensation being an exclusive remedy. N.R.S. 616.270. The key word is "employee". The statute then continues with N.R.S. 616.085 which states:

> "Subcontractors and their *employees* shall be deemed to be *employees* of the principal contractor."

These two provisions lie at the base of the Nevada "contractor-under" statute. To this basic statute must be added five other statutory provisions. The first two appear to

broaden the class of persons considered to be "statutory employees".

N.R.S. 616.115:

"'Subcontractors' shall include independent contractors."

N.R.S. 616.105:

"'Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished."

The last three provisions, on the other hand, restrict and limit the class of persons who fall within the classification of "statutory employees".

N.R.S. 616.060:

"'Employee' excludes: 1. Any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

N.R.S. 616.030:

"'Casual' refers only to employment where the work contemplated is to be completed in not exceeding 10 working days, without regard to the number of men employed, and where the total labor cost of such work is less than $100."

N.R.S. 616.120:

"'Trade, business, profession or occupation of his employer' includes all services tending toward the preservation, maintenance, or operation of the business, business premises, or business property of the employer."

Plaintiffs suggest that the interrelationship of the above statutory provisions was not adequately explored by the trial court when it accepted defendant's over literal and simplistic argument in favor of his second motion for summary judgment. They urge that a more reflective look at the present factual situation will show that Douglas Alaparet was not a "statutory employee" of the defendant.

The Rationale Behind The Summary Judgment Was Incomplete

In his successful argument below, the defendant relied solely on N.R.S. 616.085 and 616.115. The trial court accepted the argument that whether or not Harlan McNair was an independent contractor he was, by virtue of the above two provisions, vicariously a subcontractor whose employees were also employees of the principal contractor, the defendant (13a-14a). Although the plaintiffs do not concede the correctness of the above argument, particularly under one approach to the factual situation in this case; for the purpose of argument on plaintiffs' first point, it may be assumed to be. That is, assuming the defendant to be the principal contractor and Harlan McNair to be a subcontractor, albeit vicariously, the summary judgment was still improperly given because Douglas Alaparet could not have been an employee of the defendant.

As quoted above, N.R.S. 616.060 provides:

> "'Employee' excludes: 1. Any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

Like most other provisions in the Nevada Industrial Insurance Act, the Nevada courts have found it unnecessary to construe the above provision. Therefore, it is necessary to go to other jurisdictions having similar provisions to find its meaning and apply it to the present case. This type of exclusionary provision has been held to apply to both "statutory" and common law employment. *Benbow v. Edmund High School,* 67 S.E.2d 680 (S.C. 1951), and cases cited therein.

Douglas Alaparet's Relationship With The Defendant Was A "Casual" Employment

N.R.S. 616.030, *supra,* sets out two conditions for casual employment. First, that the job takes less than 10 working days. Second, that it costs less than $100.00 in labor costs. These conditions being met, the clear language of the statute demands that the employment be "casual".

The defendant admitted that the *total* price paid Harlan McNair for the job was $20.00 (17a, Q41). There is no evidence in the record that the entire contract price was to exceed this $20.00. Since this price is much less than the $100.00 in *labor* costs allowable in "casual" employment under Nevada law, the first condition of "casual" employment has certainly been met in the present case.

The second condition, that the job should not exceed 10 working days, follows as a logical deduction from the $20.00 contract price paid by the defendant. Plaintiffs submit that no jury of reasonable men could find that any welder, much less a specialized welder, would work for less than $2.00 *a day.* Because of the low contract price, the length of the repair work could not have been intended to extend past a few hours. Hence, the two conditions for casual employment have been met.

Another aspect of "casual" employment was considered in *Cardillo v. Mockabee,* 102 F.2d 620 (D.C. Cir 1939), where a once a year repair job was held to be "casual". In the present case, the defendant's employees had never before seen or heard of a well casing fracture, much less its repair (1a, 10a, 12a). From *Cardillo's* viewpoint, the present repair job seems even less than "casual".

Simply stated, the purpose of these "casual" employment provisions is, in the words of the *Benbow* case, *supra,*

> ". . . to narrow or to withdraw the application of the broader terms of the statute from these 'casual' employments, which are more or less incidental to the life of everybody."

The statute in *Benbow v. Edmund High School,* 67 S.E.2d 680 (S.C. 1951), follows word-for-word with the Nevada

provision. Under the S.C. Code (1942), 7035-2(b), "employee" excludes:

> ". . . persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer."

The facts of *Benbow* parallel those of the present case. An employee of an electrical contractor was sent to the school to repair a light fixture. The school had its own maintenance crew, but none of these employees were able to perform the repair job. The employee was injured and sought compensation from the school, his own employer being uninsured. The court stated that the record did not disclose the amount of time which would have been required to repair the light, but felt that the fact that the bill amounted to only $22.50 took care of this deficiency. On these facts, which were undisputed, the court held the employment to be "casual" and exonerated the school from compensation liability. If a "third party" action had been brought, of course, the school could have been liable. It might be added that the contractor in *Benbow* had occasionally been hired by the school to do similar repairs in the past. In the present case, the "casualness" of the employment is even more forcefully emphasized by the fact that the defendant had had no prior dealings with Harlan McNair before the fracture requiring repair occurred.

The court in *Benbow* noted that,

> "It is less difficult to recognize such 'casual' employment when it is presented in a given case than it is to lay down a rule or definition that can be decisive of every case."

It is submitted that the present case presents such a recognizable example of "casual" employment that no reasonable man could find otherwise. The question then becomes whether or not Douglas Alaparet's employment was in the course of the defendant's business.

Douglas Alaparet's Relationship With The Defendant Was Not In The Course Of The Trade, Business, Profession Or Occupation Of The Latter

A case which is strikingly analogous to the present case from the standpoint of the legal principles involved is *Best v. J. & B. Drilling Co.*, 152 So.2d 119 (La. App. 1963). The question in *Best* turned on whether the work done by an employee of a mechanical contractor for a well drilling company was in the course of the trade, business or occupation of the drilling company. It might be noted that the Louisiana statute, which controlled the *Best* case, makes no distinction between independent contractors or subcontractors. In Louisiana, there are apparently only two classes of parties to contracts, like that in the present case, the contractee (designated the "principal") and the "contractor". In effect, this was defendant's argument as to the construction of Nevada law and the interrelationship of N.R.S. 616.085 and 616.115. Therefore, because of the express terms of the Louisiana statute, the *Best* court was at the same point, to begin with, as the trial court in the present case was when the latter accepted defendant's argument that "independent contractor" equals "subcontractor" and granted summary judgment. The *Best* case shows that the present trial court should have looked further into the applicable law. In holding that the employee *was* in the course of the trade, etc., in the *Best* case, that court considered several factors which should be dispositive of the present case.

The court first noted that the cause of the repair job, a broken air compressor, had been repaired by Brown, the injured employee's employer, on two occasions in the past. As noted above, the defendant had never before called upon Harlan McNair for a repair job (9a), and in fact, had no need for a repair job on a casing fracture as such fractures were unprecedented in his line of business (1a, 10a, 12a).

The second factor noted by the court was the trial court's finding that J. & B. and others in the same trade or business in the area repaired their own compressors through their own employees. In the present case, on the contrary, there is overwhelming evidence that the repair job which

led to Douglas Alaparet's death was not one which was even contemplated by the defendant or other well drillers. As referred to above, the fracture was a case of first impression. In addition, the defendant admitted that special welding equipment was needed to perform the work (16a, Q12), which had to be supplied by Harlan McNair (19a). In short, distinguishing *Best* on the facts, there is no evidence in the present case that it was the general practice of well drillers in the Las Vegas area to have their own employees repair well casing fractures or to possess the equipment needed to do so.

The third factor considered by the *Best* court was whether the work done by Best on the project was work which could have been done by the well-driller's own employees. The court found the particular work which Best was doing at the time of the injury (checking and adjustment of the compressor *after* its repair) was no different than the work which the driller's own employees usually did. In the present case, the record is replete with references to the fact that the one welder employed by the defendant was incapable of doing the job for which Alaparet was hired (5a-6a, 10a-11a, 12, 20a-21a). In fact, the defendant has admitted that the repair work was outside the regular course of employment of his own employees (16a):

> "Q21. How many welders are in the employ of your company and why did you contract with General Machine Company rather than having one of your own welders perform the work?
>
> A. One welder. *The work to be performed was out of his line of work.*"

Best illustrates the evidence which will support a finding that the repair job in question is one which is within the course of the business of the contractee. The present case contains no such evidence, but on the contrary, presents evidence which clearly shows that the work done by Douglas Alaparet was not within the course of defendant's business.

The present case can also be distinguished from *Stansbury v. Magnolia Petroleum Co.*, 91 So.2d 917 (La. App. 1957), which was a case where an outside welder was

brought in to effect repairs on the oil company's derricks. The court said,

> "We know, as a fact, that all the major oil companies of this area engage welders and other workmen of a similar nature as their regular employees. We also know, as a fact, that any company owning oil derricks requires the services of welders for the maintenance and repair of their derricks. And for such maintenance and repair, they have welders in their regular employment."

The present defendant employed one welder who had two main jobs. One was to repair and maintain the equipment at the drilling site (the drilling rig, for example), a job coming close to the work in *Stansbury,* while the other was to weld the casings together before they were inserted into the ground (2a-3a). His previous experience in welding was limited to the maintenance of boat trailers and other repair work of a similar nature (3a).

The contrast between the work done by defendant's welder on the casings and the work to be done by Alaparet in repairing the fracture is striking. The defendant's welder's only contract with the casings was to weld them together while they were above ground by means of one continuous weld around the outside. Only then were the casings inserted into the ground (3a-5a). The welder stated that his experience in welding separated or broken materials was limited and that he had never welded separated materials which were like those in the present case (6a). Most important, he testified that he had never welded inside a pipe before nor had he welded inside similar structures such as large culverts (6a). In short, the defendant's one welder was used to doing only simple surface welding which did not call for any specialized techniques. As the defendant's supervisor clearly recognized, the repair work which led to Douglas Alaparet's death was of the nature that required a specialized welder (10a-11a, 12a, 16a).

The factual distinctions between the two Louisiana cases and the instant case emphasize the legal rules controlling all three cases. The legal principle which governs is quite simply this: unless the repair work is of the type that would normally be carried on by the contractee's

employees, there can be no employee-employer relationship between the contractee and the injured employee of a contractor doing the work, whether that contractor be considered an independent or a sub. Professor Larson amplifies this principle in § 49.12 of his treatise:

> "Practically all of the cases of general interest interpreting this type of statute are addressed to one question: when is the subscontracted work part of the regular business of the statutory employer? The statutory language varies somewhat (citing language variants) . . . But, with a surprising degree of harmony, the cases applying these assorted phrases agree upon the general rule of thumb that the statute covers all situations in which work is accomplished which this employer, or employers in a similar business, would *ordinarily* do through employees.
>
> "The activities which produce most of the close cases are the same activities which have caused difficulty in the employee-independent contractor distinction . . . peripheral and auxiliary operations such as maintenance, construction, and delivery. Here again the test must be relative, not absolute, since a job of construction or repair which would be a non-recurring and extraordinary undertaking for a small business might well for a large plant be routine activity which it normally expects to cope with through its own employed staff . . . Major repairs or *specialized* repairs, of the sort which the employer is not equipped to handle with his own force, are held to be outside his regular business (citing examples).
>
> * * *
>
> "In some of the closer cases, which in the abstract look as though they might be decided either way, the courts rely heavily upon evidence of the past practice of this employer or employers in a similar business."

Professor Larson cites the following examples for the latter proposition:

Settle v. Baldwin, 355 Mo. 336, 196 S.W.2d 299 (1946).

> "Although one might think that icing refrigerator cars would be a part of the business of a railroad operating such cars, the contrary result was reached on a showing that no railway employees had been used for that purpose for twenty years."

Britton v. Ind. Comm., 248 Wis. 549, 22 N.W.2d 525 (1946).

> "... the dusting of growing peas by aircraft was ruled an activity outside the business of a cannery, since the cannery had no equipment or employees adapted to this kind of work."

Cannon v. Crowley, 318 Mass. 373, 61 N.E.2d 662 (1945).

> "... a showing that it was the established practice not only of this particular steam-shovel owner, but of others in the same business, to get the shovels moved by independent contractors was held decisive in placing such transportation outside the business of the owner."

The *Cannon* case is interesting as it was defendant's contention in the trial court that Nevada had adopted the broad type of compensation coverage applied in Massachusetts which, he argued, would encompass the plaintiff's decedent within and grant the defendant immunity from this "third party" action. *Cannon v. Crowley* shows that merely shouting "common employment" will not suffice to establish an employer-employee relationship where it does not, in fact, exist.

The defendant also seems to raise another point in the affidavit of Mr. Fowler which states that the repair was necessary for the completion of the contract between the defendant and the Water District and that, because the repair was not completed by Alaparet, the defendant had to commence an entirely new well (20a-22a). The same theme appears in the affidavit of Mr. Lemon (22a-24a). The fact that a new well had to be commenced points up the special nature of the repair and the inability of the

defendant's employees to do the same. However, even if this reasonable inference is disregarded, the mere fact that the repair may have been necessary to the completion of the overall well-drilling project or even that the defendant was obligated to repair his own mistakes does not put the repair work in the course of defendant's business. As Professor Larson concludes in the above quoted section,

> "From these cases it will be readily seen that the test is not one of whether the subcontractor's activity is useful, necessary, *or even absolutely indispensable* to the statutory employer's business since, after all, this could be said of practically any repair, construction or transporation service."

The repair work upon which Alaparet was engaged when he suffered his fatal injury was not the type of work the defendant's employees did do in the past or could have done at that time. The overwhelming weight of evidence places it in the class of employment *not* in the course of the alleged employer's business of well drilling.

Even though the defendant was clearly the principal contractor in relation to the overall project of drilling the well with Harlan McNair arguably being a subcontractor on that project, the conclusion, based on the undisputed evidence in the present case, that Douglas Alaparet's employment was both "casual" and not in the course of the defendant's business of well drilling excludes him from the catagory of being defendant's employee under N. R. S. 616.060.

The Defendant Is On The Horns Of A Dilemma

The present case may be looked at from a slightly different perspective. In the above argument, the overall project of well drilling was given the central position. There is no question that the defendant was the Water District's principal contractor on that project and that the project of well drilling was the defendant's business. Plaintiffs do not as readily concede that Harlan McNair was a sub-

contractor on this project as they do not believe that the correct interpretation of N.R.S. 616.085 and 616.115 permits that result. However, even assuming the defendant to be correct, the "casual" and ancillary nature of Alaparet's employment would exclude him from the defendant's employ in regard to the well-drilling project.

Instead of looking at the overall project of well drilling, however, one could consider the repair job to be a project in itself. This follows from the above argument which certainly indicates that the repair of casing fractures is beyond and distinct from the business of well drilling. If this view of the present factual situation is taken, several Nevada cases support the proposition that it was Harlan McNair, not the defendant, who should be regarded as the principal contractor on the repair of the fracture. In both *Simon Service v. Mitchell,* 73 Nev. 9, 307 P.2d 110 (1957) and *Titanium Metals v. District Court,* 76 Nev. 72, 349 P.2d 444 (1960), an owner of the premises, not normally in the construction business, had undertaken to contract for the erection of a building. In effect, each owner acted as his own general contractor. In both cases, the owner employed men directly under him to work on the construction project (in *Titanium,* 54% of the work), as well as subcontractors for specific phases of the work. Both cases applied the principle that:

> "If an owner chooses to retain in his own hands the business of erecting the building, and to parcel out fractions of the work of construction among separate contractors each responsible solely to the owner for a fraction only of the entire work, the owner must be held to be the principal employer . . . and also to be engaged in the business of constructing the building."

Extension of the above principle to the present case would mean that the defendant could be regarded as having been temporarily engaged in a business (specialized welding repair) different from his primary business of well drilling. If so, then Alaparet's employment was certainly in the course of that business, "casual" or not. But, if the defendant is to be looked at as engaging in a new business,

it is by no means certain that his status of a principal contractor would still be retained, as well as Harlan McNair's arguable status as a subcontractor.

Titanium Metals indicates that the test as to whether a person is a subcontractor, a principal contractor, or merely a person "having the work done" depends on the share of the project undertaken by that person. For example, in *Titanium,* Titanium Metals was engaged primarily in metal processing. The court found that Titanium Metals was the principal contractor on its secondary construction project because it provided 54% of the labor and materials on that project directly. Atkinson, the alleged principal contractor, contributed only 46% to the project. To arrive at these percentages, the court looked only to the share of the particular project in which Titanium Metals was temporarily engaged. Presumably, if Atkinson had contributed over 50% of the work on that project, he, not Titanium Metals, would have been held to be the principal contractor. Applying this analysis to the present case, the determination of the relationship between the parties on the project of repairing the fracture would depend on the shares of their participation on that project. To consider this case in light of *Simon* and *Titanium,* the activities of the parties in regard to the repair job, and that alone, must be looked to.

In the present case, the defendant contributed virtually nothing to the repair of the fracture. Harlan McNair was to supply all the labor and materials (19a). Defendant's employees' only contact with the work, save for the disputed factual issue of who was responsible for turning on the oxygen, was to lower Douglas Alaparet into the well on a sling which he had constructed himself (15a-17a). Nor were there any other subcontractors involved in the repair of the fracture. Under *Titanium,* a person becomes a principal contractor only when he does over 50% of the work himself through directly employed employees or, in combination with *Simon Service,* when he subcontracts out a majority of the work among several subcontractors, each of whom is responsible for a minority of the project. In the present case, Harlan McNair

was obviously responsible for the bulk of the repair project, and it is not too much to say that defendant's participation, alone or through other contractors than McNair, was totally insignificant in regard to that project.

In *Simon Service,* as in *Titanium Metals,* the businessman who was temporarily engaged in the construction project assumed the greater bulk of the work through directly hired employees:

> "Appellant, although it employed no general contractor for the entire construction, did employ as a separate contractor, the plumbing contractor to install the sheet metal work, as well as employing separate contractors for other phases of the work. . . . In turn the fact that appellant itself undertook construction of the building (by directly employing two carpenters and a construction engineer) and entered into separate contracts for installation of the plumbing, sheet metal, electrical wiring, painting, etc. would seem to indicate that it could reasonably be designated the principal contractor."

The rationale behind the *Simon* decision that the owner was also the principal contractor is found in these words, which show the court's fear of the consequences if the decision had gone the other way,

> ". . . It would compel an owner, *who is himself an experienced construction man,* to employ a 'principal' contractor who would, perchance let out every phase of the work in subcontracts precisely as the owner would do without the intervention of a 'principal contractor'."

The thrust of this language seems to be that not only must there be substantial participation for one to be temporarily engaged in a business as a principal contractor, but also a modicum of experience in that business. If these criteria are lacking, as in the present case, a contractee temporarily engaged in a project cannot be the principal contractor for that project. In the words of *Simon,* he would be merely "a person having the work done" who is not

an employer of the employees working on the project. It is submitted that relative to the repair project, which is the only business under the present facts that Douglas Alaparet's employment could have been in the "course of", Harlan McNair would stand under the *Simon Service* and *Titanium Metals* decisions as the principal contractor and the defendant as "a person having the work done".

To recapitulate both arguments, the defendant is on the horns of a dilemma. If he argues that the repair project is to be looked at as part of his overall business of well drilling, where he is obviously a principal contractor and Harlan McNair is arguably a subcontractor by virtue of statutory "construction", the record shows that Douglas Alaparet's employment was both "casual" and not in the course of that business. If he argues that the repair project should be considered to be independent of the business of well drilling, which is quite reasonable in light of the record, he avoids the "not in the course of" roadblock. However, adding the inconsequential participation of the defendant in the repair project to the holdings of *Simon* and *Titanium* leads to the conclusion that the defendant was not a principal contractor in relation to the repair project, but merely "a person having the work done". In neither case, can Douglas Alaparet be considered an employee of the defendant.

"Only When Acting As A Subcontractor To A Principal Contractor Does N.R.S. 616.115 Apply To Include Independent Contractors"

The defendant's argument before the trial court emphasized his belief that N.R.S. 616.115 includes all independent contractors, working on a project, within the class of subcontractors to the principal contractor on that project, in which case N.R.S. 616.085 makes the independent contractor's employees also employees of the principal. While there is *dicta* in *Simon* which may be construed to support this argument,

"... it makes no difference whether we consider the plumbing company to have been a subcontractor or an independent contractor. It did in any event enter into a contract for installing the sheet metal work — and it entered into such contract with the defendant." 73 Nev. at 12.

"... Whether these separate and individual contractors are denominated subcontractors or independent contractors would not affect their direct relationships with appellant." *Id.* at 16.

there is clearer Nevada authority that the sweep of the Nevada "contractor-under" statute is not as broad as the defendant would have it. Two years *after* the court in *Simon* laid down the above language upon which the defendant so heavily relied below, the Attorney General of Nevada declared,

"The Act does not apply to 'independent contractors' *who are truly such in fact* (emphasis in original).
...

"The reference to the words, 'contractor', 'contractors', 'subcontractor'; and 'subcontractors', as used in the Act, indicate that the Legislature contemplated application of the Act to relationships normally existing in the building industry. This industry, where the incidence of accident and injury is normally high because of the nature of the work involved, is a matter of serious concern, for which the Act would be expected to make adequate provision. In order to insure proper industrial insurance coverage in the building construction industry, the Act therefore, expressly provides that subcontractors and their employees shall be deemed to be employees of the principal contractor. (NRS 616.085). *Only when acting as such 'subcontractor' to a 'principal contractor'* (emphasis in original), does NRS 616.115 apply to include 'independent contractors'. It is possible for an 'independent contractor' to be such, in fact, for one

> purpose, and a 'subcontractor' and 'employee' for another purpose, as in the building industry.'' 1959 O.A.G. 457 at 459, 460.

''Subcontractor'' is nowhere defined in the Nevada Act. One may assume from the above quotation that the definition favored by Nevada would parallel the usual dictionary definition barring contrary expressions by the Nevada courts. The generally accepted definition of ''subcontractor'' is:

> ''One who takes a portion of a contract from a principal contractor or another subcontractor. . . . One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance. . .'' *Black's Law Dictionary* 1593 (4th ed. 1951).

The thrust of this definition certainly seems to predicate the existence of a subcontract upon a fractional taking over of an activity which was contemplated to be within the scope of the original contract or which is usually associated with completing that type of contract. Viewed in this light, the contractors in *Simon Service* and *Titanium Metals* were clearly subcontractors, even if an attempt was made to call them ''independent contractors'', since they undertook to complete a portion of the original contract. The activities that they engaged in were those normally associated with construction of a building. In the present case, it is inconceivable that the defendant and the Water District included the activity engaged in by Douglas Alaparet with the activities necessary to complete the well drilling contract. The record establishes that the fracture which raised the need for the repair was unprecedented and none of the defendant's employees had seen or heard of a similar incident (1a, 10a, 12a). It would seem to be clear from this fact that Harlan McNair did not take a portion of the contract between the defendant and the Water District. It also seems clear that Harlan McNair did not contract for performance of an act for which the

defendant had already contracted. The defendant admitted that his own employees were incapable of making the repair (16a), which is more than adequately borne out by the record (5a-6a, 10a-11a, 12a, 20a-21a). From these facts, it seems rather doubtful that Harlan McNair could be termed a "subcontractor" in the normal sense of the word. Since "independent contractors" are "subcontractors" only when actiing as such to a principal contractor, these facts would exclude Harlan McNair from the category of a "subcontractor."

To bolster his argument, defendant argued that Nevada, through *Simon Service,* had adopted the "common employment" doctrine of Massachusetts. If so, it was adopted *sub silentio* and in disregard of the clear wording of the Nevada "same employ" statute, N.R.S. 616.560. However, even if Nevada did adopt the "common employment" approach, it would gain the defendant little because of the facts of this case. *Anderson v. N.Y., N.H. & H. R.R. Co.,* 159 F. Supp. 90 (D. Conn. 1958), considered a situation analogous to that at bar. The plaintiff was an employee of the Pullman Company which had entered into a contract with the defendant railroad to service its cars. In defense to plaintiff's "third party" action, the railroad raised the defense that the plaintiff was engaged in a "common employment" with the railroad. It would appear that the Massachusetts rule makes no express distinction between independent contractors and subcontractors. There are still limitations on this rule, however, as *Anderson* brought out,

> "The Railroad to avail itself of section 18 as an effective defense, must show (in part):
>
> 1. That the Railroad entered into a contract with the Pullman Co. to do a part of the Railroad's work.
>
> 2. That the work done by the Pullman Co. for the Railroad was not 'merely ancillary and incidental' to the business of the Railroad."

The limitations placed on the "common employment" rule by *Anderson* are no different, at least not substantially different, than the limitations imposed by "not in the course of" statutes. Hence, whether one argues "common employment", "same employ", a peculiar brand of statutory construction or whatnot, the basic question in this case, which will be determinative of this present issue as to whom Douglas Alaparet was employed by, *is whether or not the specialized welding repair of the fracture was work which would be ordinarily done by a well-drilling contractor.*

If an ordinary well driller in Las Vegas County would not normally do this type of specialized repair, and plaintiffs take the position that the record bears out the fact that an ordinary well-driller would not, then there is no reason to apply the "contractor-under" or "statutory employer" statute to their decedent. As Professor Larson puts it, at § 49.11,

> "The purpose of this legislation was to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within his power, in choosing subcontractors, to pass upon their responsibility and insist upon appropriate compensation protection for their workers. The statute also aims to forestall evasion of the act by those who might be tempted to subdivide *their regular operations* among subcontractors, thus escaping direct employment relations with the workers and relegating them for compensation protection to small contractors who fail to carry . . . compensation insurance."

Can it be said that the repair work carried on by Douglas Alaparet was part of the regular operations of the defendant?

Conclusion

The key facts which control the question of Douglas Alaparet's employment relationship with the defendant, or lack of it, are (1) that the fracture was unprecedented in the business of well-drilling in the area; (2) that the repair work was specialized and beyond the capability of the defendant's employees; (3) that the defendant did not have equipment on hand to fix the fracture; (4) that Harlan McNair took on the entire repair project with the defendant contributing little or nothing in the way of labor, materials or experience; and (5) that the contract price for the repair was $20.00.

These facts are well established by the record. They arise from the defendant's own testimony and that of his employees. It is the plaintiffs' position that these facts show that Douglas Alaparet was not an employee of the defendant, statutory or otherwise.

A Court of Appeals may direct a district court to enter a summary judgment for an appellant even though the appellant did not make motion therefor. *First Nat. Bank v. Maryland Cas. Co.,* 290 F.2d 246 (2d Cir. 1961); *cf., United States v. Great Northern Ry. Co.,* 337 F.2d 243 (8th Cir. 1964); see also *Make v. Celebrezze,* 236 F. Supp. 174 (N.D. Cal. 1964).

The issue as to Douglas Alaparet's employment status was clearly before the district court as were the undisputed facts outlined above. Plaintiffs suggest that the district court took a too limited view of the applicable law when it granted the defendant's second motion for summary judgment. They urge that an opposite result should have been reached on this issue.

RELIEF

Plaintiffs respectfully request this court to reverse the summary judgment entered in the district court in favor of the defendant on the issue of their decedent's employ-

ment status and to direct that court to enter judgment for them on that issue, or in the alternative, to grant any such relief as this court feels is fair and just.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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